STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

NATHANIEL HARRIS, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021, Respondent.	Case No. SF-CO-761-E PERB Decision No. 2275 June 26, 2012

Appearance: Nathaniel Harris, on his own behalf.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Nathaniel Harris (Harris) of the Office of General Counsel's dismissal (attached) of his unfair practice charge. The charge, as amended, alleged that the Service Employees International Union Local 1021 (SEIU) violated the Educational Employment Relations Act (EERA) [1] by failing to represent him. The Office of the General Counsel dismissed the charge, concluding that some of the allegations were untimely and the remaining allegations failed to state a prima facie case of breach of the duty of fair representation.

We have reviewed the entire record in this matter and given full consideration to the appeal. Based on our review, the Board finds the warning and dismissal letters to be well-reasoned, adequately supported by the record and in accordance with the applicable law.

[1] EERA is codified at Government Code section 3540 et seq.

Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself.

DISCUSSION

Pursuant to PERB Regulation 32635, subdivision (a)[2] an appeal from dismissal of an unfair practice charge shall:

> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

To satisfy the requirements of this regulation, the appeal must sufficiently place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H; *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that does not reference the substance of the Board agent's dismissal fails to comply with PERB Regulation 32635, subdivision (a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381; *Lodi Education Association (Huddock)* (1995) PERB Decision No. 1124; *United Teachers – Glickberg* (1990) PERB Decision No. 846.) Likewise, an appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635, subdivision (a). (*Contra Costa Health Services Department* (2005) PERB Decision No. 1752-M; *County of Solano (Human Resources Department* (2004) PERB Decision No. 1598-M.)

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The appeal reiterates allegations in the charge concerning Harris's dispute with the Fremont Unified School District (District) about having been placed on a 39-month rehire list instead of granted a leave of absence. The appeal also reiterates allegations in the charge concerning Harris's dissatisfaction with SEIU in relation to this dispute.[3] The appeal does not reference any particular portion of the dismissal or otherwise state the specific issues of procedure, fact, law or rationale to which the appeal is taken. Nor does it identify the page or part of the dismissal to which the appeal is taken or state the grounds. Thus, the appeal is subject to dismissal on this ground alone. (*City of Brea* (2009) PERB Decision No. 2083-M.)

ORDER

The unfair practice charge in Case No. SF-CO-761-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dowdin Calvillo and Huguenin joined in this Decision.

[3] The appeal also raises a question whether the District's termination of Harris's benefits violates Education Code requirements concerning leaves of absence and return rights following an injury. This question is not germane to the issues raised in Harris' charge against SEIU for breach of the duty of fair representation.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
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December 19, 2011

Nathaniel Harris

Re: *Nathaniel Harris v. SEIU Local 1021*
Unfair Practice Charge No. SF-CO-761-E
DISMISSAL LETTER

Dear Mr. Harris:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 12, 2011. Nathaniel Harris (Harris or Charging Party) alleges that SEIU Local 1021 (Union or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by failing to represent him. The Union's Response was filed on April 21, 2011. An Amended Charge was filed on April 26, 2011.

Harris was employed as a Gardener at the Fremont Unified School District (District) in a bargaining unit that was exclusively represented by the Union. Harris was informed in the attached Warning Letter dated November 7, 2011, that the above-referenced charge did not state a prima facie case. Harris was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Harris was further advised that, unless the charge was amended to state a prima facie case or withdrawn on or before November 17, 2011, the charge would be dismissed. Harris requested and was granted several extensions to file an amended charge. On November 15, 2011, PERB received additional documents from Harris that were accompanied by a proof of service demonstrating that the documents had been served on Respondent. Although the documents were not prefaced with any explanatory message or cover letter, PERB has treated these documents as a second amended charge.

Review of the second amended charge has revealed the following relevant facts. On October 27, 2010, Harris received a notice from the District that informed him that his last day in paid status was October 22, 2010. Additionally, the District informed Harris that he must elect one of the following three options no later than December 1, 2010: "(1) You may return to work immediately with a release from your doctor; (2) You may request an unpaid FMLA Leave of Absence for up to 12 weeks (This form is enclosed for your convenience); or (3) You may

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

resign your position, in which case you will be placed on the 39-month rehire list. (This form is enclosed for your convenience.)" Additionally, the notice from the District informed Harris that if he did not elect one of the above-stated options, his benefits would be terminated on December 1, 2010. This letter was signed by Anita Finefrock, Benefits Desk.

On Tuesday, November 2, 2010, Harris telephoned Tim Woodward, the Director of Classified Personnel and left a message requesting that Woodward call him. Harris again telephoned Woodward on November 25, 2010, but did not speak with him. On November 30, 2010, Harris submitted a handwritten letter to Woodward's office stating, in relevant part:

> Re: Response to October 27, 2010 letter
>
> Tim Woodward,
>
> I have called your office on Tues Nov 2, 2010 at 12:30 pm and left a message for you to call me. I did not hear back from you so I called your office again on Thursday Nov 25, 2010 at 9:00 am, again your girls in the office screened your calls and said they would leave you the message. I have not heard from you so I am letting you know that I would like to request a leave of absence. I will contact Kaden Kratzer to advise him of the same decision.

On November 30, 2010, Union Representative Kaden Kratzer sent an e-mail message to Woodward stating that Harris would be providing Woodward with a response to "the letter received on October 27, 2010."

According to Harris, the October 27 letter from the District did not specify the manner in which he was to elect one of the options listed in the letter. It is not clear whether the forms referenced in the letter were attached to the copy that Harris received; there are no forms attached to the copy provided to PERB. Thus, in telephoning Woodward, writing to Woodward, and in requesting that Kratzer contact Woodward on his behalf, Harris believed that he was invoking his FMLA right to a twelve-week unpaid leave of absence.

On December 6, 2010, Harris again contacted Kratzer to inform him that he had been unable to obtain a doctor's release, as his medical benefits had been cancelled. He requested that Kratzer inform Woodward of the delay. Kratzer complied with Harris's request by forwarding Harris's e-mail message directly to Woodward.

On December 8, 2010, Harris sent an e-mail message to Kratzer stating that the District had cancelled his health benefits and he was unable to get a doctor's evaluation of his medical status. In response to Harris's e-mail message, Kratzer states the following:

> Nathaniel I can contact them but I can tell you right up front that they most likely will not reinstate the benefits because of the due date given on the letter they sent you with choices.

> This letter was sent to you well in advance of that occurrence and gave you a month to come to a resolution.

On February 10, 2011, Harris received notification from the District that his last day of paid status with the District had been October 22, 2010, after which point he had been on unpaid leave status pursuant to the Family Medical Leave Act. The twelve weeks of unpaid leave under the FMLA had been exhausted, he had been placed on the 39-month rehire list, and his health benefits had been terminated on December 1, 2010. The District had also received notice from Harris in February 2011 that he was still considered medically unable to return to work. Based on that information and in accordance with Government Code section 21153, the District applied for a disability retirement on Harris's behalf.

On April 12, 2011, Harris delivered a handwritten letter to Woodward requesting responses to a number of inquiries that had been made to Woodward in various e-mail messages.

On May 6, 2011, Harris sent a letter to Woodward that was apparently intended as an appeal of his placement on the rehire list, and requesting to be reinstated to his former position.

On an unspecified date prior to August 25, 2011, Harris filed a complaint with the District regarding Woodward. On August 25, 2011, the District informed Harris that although he had informed the District that he was capable of returning to work, he had not provided the District with a full medical release. Therefore, the District found that Harris had been properly placed on the 39-month rehire list, and the complaint against Woodward was unfounded.

On September 20, 2011, the District informed Harris that the physician's statement that he provided to the District dated January 20, 2011 was insufficient to reinstate him to an eligible work status and that the complaint against Woodward was unsubstantiated and would be considered closed. Harris was to remain on the 39-month rehire list.

Discussion

Based on the facts provided in the original and amended charges, Harris argues that the Union should have come to his aid when the District cancelled his health benefits on December 1, 2010. According to Harris, he had complied with the October 27 notice, had provided Kratzer with evidence that he had complied, and that the District had denied the fact of his compliance, resulting in the injurious loss of his medical benefits. Harris sought restoration of these benefits by entreating the Union to intervene on his behalf.

In the November 7, 2011 Warning Letter, PERB informed Harris that his charge would be dismissed unless he provided additional facts demonstrating that within the six months immediately preceding the filing of the charge, the Union owed Charging Party a duty of fair representation and breached that duty by engaging in arbitrary, discriminatory or bad faith conduct.

The facts provided in the second amended charge do not cure the deficiencies described in the November 7, 2011 Warning Letter for the following reasons.

As noted in the November 7, 2011 Warning Letter, there is no duty of fair representation owed to a unit member unless the exclusive representative possesses the exclusive means by which such employee can obtain a particular remedy. (*California State Employees' Association (Darzins)* (1985) PERB Decision No. 546-S.) The exclusive representative possesses the sole means by which a unit member has access to the negotiation process, as well as the grievance and arbitration procedure. (*California State Employees' Association (Darzins)* (1985) PERB Decision No. 546-S.)

In this case, Harris's request for a medical leave of absence and the need to comply with federal or state regulations in order to establish his right to a medical leave of absence are not matters exclusively within the Union's control. This issue is separate from the question of whether Harris met the requirements of the October 27, 2010 letter when he notified Woodward of his intent to seek unpaid leave under the FMLA.

Indeed, even assuming Harris's November 30 letter to Woodward met the requirements of the October 27 letter thereby entitling him to twelve weeks of unpaid leave, because the Union did not have the ability to make the election on Harris's behalf or possess any means by which Harris could obtain one or the other of the three options presented in the October 27 letter, it appears that the Union did not owe Harris any duty of fair representation in this matter. The matter is complicated further by Harris's apparent failure to properly make one of the three possible elections given him in the October 27, 2010 letter by returning either of the attached forms to Anita Finefrock at the Benefits Desk. Thus, despite the additional evidence provided on December 15, 2011, demonstrating the Union's failure to intervene on Harris's behalf when the District refused to recognize his November 30, 2010 attempt to comply with the October 27, 2010 letter, it is not clear that this conduct breached any duty owed by the Union.

Therefore, the charge is hereby dismissed based on the facts and reasons set forth in this and the November 7, 2011 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[2] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Alicia Clement
Regional Attorney

Attachment

cc: Vincent Harrington, Jr., Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

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November 7, 2011

Nathaniel Harris

Re: *Nathaniel Harris v. SEIU Local 1021*
Unfair Practice Charge No. SF-CO-761-E
WARNING LETTER

Dear Mr. Harris:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 12, 2011. Nathaniel Harris (Harris or Charging Party) alleges that SEIU Local 1021 (Union or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by failing to represent him. The Union's Response was filed on April 21, 2011. An Amended Charge was filed on April 26, 2011.

PERB's investigation of the original and amended charges and the Union's response to the original charge revealed the following relevant facts. Harris is a Gardener for the Fremont Unified School District (District). He is employed in a bargaining unit that is exclusively represented by the Union. In 2007, Harris was involved in an altercation with another employee in which he was deemed the aggressor. Harris contends that the investigation of this incident by the employer was faulty, and that the Union did not assist him in ensuring a fair investigation was conducted. As a result of the incident and ensuing investigation, Harris was placed on an involuntary leave of absence for a period of approximately 2.5 years.

After his return to work in June 2009, Harris experienced treatment from his supervisor(s) that he characterizes as harassment. For example, he was denied a position as an equipment operator, he was denied a request to work overtime, he was denied a request to transfer to a different position, he was denied a request to work out of class, and at times he was told he could not drive his vehicle to work sites, while at another point in time, he was required to obtain a "class b [driver's] license" in order to keep his job.

In January 2010, Harris had a "melt down due to all the stress and unfair treatment from [his] employer" and sought a medical leave of absence from work. In March 2010, Harris attended a meeting with his supervisor at which he was represented by the Union. The purpose of the meeting was, apparently, to determine if Harris would be permitted to work at a temporary

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

position with the District while he was on a medical leave from his permanent position. Ultimately, Harris was not permitted to return to work as a temporary employee while still on a leave of absence.

In November 2010, Harris received a notice from the District informing him that as of December 2010, one of the following conditions would need to be met: 1) Harris returned to work; 2) Harris resigned, or 3) Harris opted to take an unpaid sick leave. The District also notified Harris that if he failed to respond, his health benefits would be cancelled as of December 2010. In the Charge, Harris states, verbatim,

> November 2010, I recieve a letter from fremont unified school distric stating my benifeits will be removed as of december 2010, and i have 3 options, return to work, resighn, or take an unpaid sick leave. I contacted my union about the matter before December 2010 deadline and asked kaden kratzer to set up a meeting because the only option i was able to elect was the sick leave. My union told me this is a matter between my employer and me and i need to contact them myself. I submitted a response to fremont letting them know do to the fact they were unable to accommodate my doctors reccomendation i am still out on stress leave therefore i am electing to take a stress leave.

In January 2011, the District notified Harris that it had not received a response to its November 2010 letter to him, and that he would be placed on a 39-month rehire list.

In April 2011, the District notified Harris that it was freezing a vacant position for which he had applied in February 2010. Also in April 2011, Harris received a letter from the District informing him that his application for a position as a Painter had been denied because it was incomplete. Harris inquired as to the specific deficits in his application, but has not received a response from the District. When Harris contacted Union Business Agent Kaden Kratzer for assistance with his application process, Kratzer declined to provide assistance, instead informing Harris that the dispute was a matter between himself and the District.

In its response, which was filed before the Amended Charge, the Union raises a timeliness defense. According to the Union, the charge on its face contains no allegations during the six month period between November 12, 2010 and April 12, 2011, when this charge was ultimately filed.

Discussion

1. Timeliness

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35

Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

In this case, the majority of facts contained in the charge pre-date the six month statute of limitation and therefore, may not form the basis of an alleged violation of the Act. Accordingly, these allegations will be dismissed

However, there are some facts which occurred during the critical time-period in the six months immediately preceding the April 12, 2011 filing date of this charge, and these facts will be examined for the prima facie elements of a complaint for a breach of the duty of fair representation.

2. Breach of the Duty of Fair Representation

Harris has alleged that the Union denied him the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). In order to state a prima facie violation of this section of EERA, Harris must show that the Union's conduct was arbitrary, discriminatory or in bad faith. However, PERB has long recognized that there is no duty of fair representation owed to a unit member unless the exclusive representative possesses the exclusive means by which such employee can obtain a particular remedy. (*California State Employees' Association (Darzins)* (1985) PERB Decision No. 546-S.) The exclusive representative possesses the sole means by which a unit member has access to the negotiation process, as well as the grievance and arbitration procedure. (*Ibid.*) There are, however, alternative sources of assistance available to a unit member who seeks to enforce statutory rights in a court of law. (*Ibid.*)

Harris states that he contacted the Union about the District's November 2010 notice regarding loss of his benefits "before [the] December 2010 deadline." This statement does not provide sufficient specificity for PERB to find that the events occurred within the six month statute of limitations, or in this case, on or after November 12, 2010. Even if the events occurred within the six month statute of limitations, however, it is unclear what form of assistance Harris sought with regard to the District's notice to him. Where it is unclear what form of assistance Harris sought, PERB cannot assess whether the Union possessed the sole means by which Harris could obtain the desired remedy. As a result, PERB cannot determine whether the Union had a duty to assist Harris with his particular request.

Harris also states that he contacted Union Representative Kratzer for assistance with regard to an April 2011 notice he received from the District. Although an exact date is not provided, it is clear that this event occurred within the six month statute of limitation. At the time, Kratzer informed Harris that it would not assist him with his concern that the District had failed to rehire him. However, given that Harris was no longer an employee of the District at the time of his April 2011 request for the Union's assistance, it is not clear that the Union owed any duty to assist him in seeking reemployment with the District. (*Santa Ana Educators Association (Felicijan & Hetman)* (2009) PERB Decision No. 2008.)

In summary, Charging Party must amend the charge to include facts demonstrating that, within the six month period immediately prior to filing the above-referenced unfair practice charge, the Union owed Charging Party a duty of fair representation and breached that duty by engaging in arbitrary, discriminatory or bad faith conduct. Absent these facts, the charge will be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case.[2] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before November 17, 2011,[3] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Alicia Clement
Regional Attorney

AC

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[2] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[3] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)